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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/805,714

03/22/2004

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DVME-1003USDIV4

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EXAMINER

GETTMAN, CHRISTINA DANIELLE

ART UNIT

PAPER NUMBER

3734

MAIL DATE

DELIVERY MODE

01/31/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Office Action Summary**

Application No.

10/805,714

Applicant(s)

SUYKER ET AL.

Examiner

Christina D. Gettman

Art Unit

3734

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 30 October 2007.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 15-30 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 15-30 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 22 March 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on October 30, 2007, has been entered.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 15-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Balazs et al. (U.S. Patent No. 5,669,918). Balazs et al. disclose the invention substantially as claimed including an applicator (see Fig. 1) for making an anastomosis including a head with (see Fig. 2a) a plurality of arms (ref. 20, Fig. 2a), the arms moveable between a first and second position (see ref. 20 in Fig. 2a and Fig. 2b), a shank-like element (ref. 5, Fig. 2a and 2b) to aid in moving the arms between the two positions, wherein the distal ends of said arms support a hollow structure (col. 8, lines 28-31) and hold joining elements (ref. 30, Fig. 2a; ref. 30 if Fig. 2b is located at the distal end of the arms), a proximal end of each arm is attached to an attachment member (ref.

2, Fig. 2a and 2b), said arms expand from the first to second position by deformation (by deformation against ref. 42, Fig. 2a and 2b), a part proximal to the distal end of the shank-like element having a surface portion (ref. 22 and ref. 54, Fig. 2a and 2b), a detainer (ref. 35, Fig. 2a and 2b) for controlling movement of the joining elements, the detainer comprising surface portions (distal end of ref. 35, Fig. 2a and 2b), the detainer being axially moveable with respect to the arms (see difference between ref. 35 in Fig. 2a and 2b; the detainer moves axially as the arms are moved outward and inward), axial movement of the detainer positions the joining elements (col. 8, lines 34-40), the joining elements becoming disengaged from the surface portions (after they have been put into the hollow structure, they are released from the surface portions), and the surface portions (ref. 4, Fig. 2a and 2b; ref. 4 prevents lateral movement of the arms until they are pushed outward by the shank-like element; ref. 4 is also part of the detainer because it is connected to it) limiting the movement of the arms form part of the detainer (the detainer is part of the head) or head. Balazs et al. do not disclose one of the positions having a distal end that has a smaller diameter than its proximal end. However, in *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), cert. denied, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device. Decreasing the diameter of the first position from what it is in Balazs et al. would not change the function of the device.

***Response to Arguments***

Applicant's arguments with respect to claims 15-30 have been considered but are moot in view of the new ground(s) of rejection.

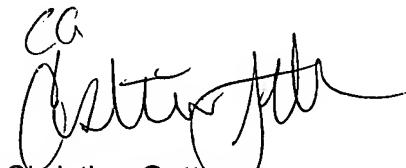
***Conclusion***


The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Filipi (U.S. Patent No. 4,505,414) disclose an expandable anvil surgical stapler that has arms that expand outward. Filipi also discloses a detainer that has interior surface portions that restrict movement of the arms.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Christina D. Gettman whose telephone number is 571-272-3128. The examiner can normally be reached on Monday-Friday 7:15 am to 3:45 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Hayes can be reached on 571-272-4959. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
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Art Unit 3734  
571-272-3128

  
MICHAEL J. HAYES  
SUPERVISORY PATENT EXAMINER